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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Anchor Coin

Serial No. 75/385,414

Daniel P. Burke of Galgano & Burke for Anchor Coin.

Christopher M. Turk, Trademark Examining Attorney, Law
Office 114 (Conrad W. Wong, Managing Attorney).

Before Hanak, Hohein and Rogers, Administrative Trademark
Judges.

Opinion by Rogers, Administrative Trademark Judge:

Anchor Coin has filed an application to register the
mark BIG BUCKS BINGO for goods identified as "currency
and/or credit operated slot machines and gaming devices,
namely gaming machines."¹ During prosecution, applicant
acceded to the Examining Attorney's requirement that
applicant enter a disclaimer of BINGO.

¹ Serial No. 75/385,414, in International Class 9, filed October
30, 1997, based on applicant's allegation of a bona fide
intention to use the mark in commerce.

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), because of the prior registration of BIG BUCKS for "casino services; namely, operation of gaming machines,"² and BIG BUCKS SLOTS for "slot machines."³ Office records list Bally Manufacturing Corporation as current owner of both registrations. When the Examining Attorney made the refusals of registration final, applicant appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested.

The determination under Section 2(d) of the question of likelihood of confusion is based on an analysis of all of the probative facts that are relevant and for which there is evidence of record. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion presented by this case, key considerations are the similarities or dissimilarities of the marks, the similarity or dissimilarity of the goods and services, and the classes of

² Registration No. 1,847,026, issued July 26, 1994, in International Class 41. Section 8 and 15 affidavits accepted and acknowledged, respectively, as of March 15, 2000.

³ Registration No. 1,388,945, issued April 8, 1986, in International Class 9. Section 8 and 15 affidavits accepted and acknowledged, respectively, as of September 30, 1992. The registration includes a disclaimer of "SLOTS."

purchasers and ultimate users of the involved goods and services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

A preliminary matter to be considered is applicant's attempt to rely on third-party registrations to show weakness in the cited marks. In the final refusal of registration, the Examining Attorney quite clearly explained that applicant's submission of a list of registration numbers and corresponding marks was insufficient to place the third-party registrations in the record. In applicant's brief, applicant promised to make a future submission of copies of relevant registrations. The Examining Attorney, in his brief, clearly objected to any such submission and noted that all evidence to be considered in an ex parte appeal must be made of record prior to filing the appeal. The Examining Attorney's position is correct. See Trademark Rule 2.142(d); see also, authorities collected in TBMP §§ 1207.01 and 1207.03. Therefore, the Board has not considered the third party registrations submitted by applicant subsequent to the submission of its appeal brief, as a "supplement" thereto.

In regard to the refusal based on the registered mark BIG BUCKS for casino services, the Board considers first, the marks. The registered mark is on the Principal

Register and, under Section 7 of the statute, the mark is presumed to have been validly registered. Further, registration was obtained without resort to Section 2(f) of the statute. Therefore, at worst, the registered mark can be considered suggestive of registrant's services.⁴

Applicant's mark includes the entirety of the cited mark, plus the disclaimed term BINGO. While even disclaimed terms must be considered in the comparison of marks, and in an appropriate case may contribute to a finding of no likelihood of confusion, disclaimed matter is typically less significant or less dominant than other components of trademarks. *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976). Moreover, in comparing the cited BIG BUCKS mark with applicant's BIG BUCKS BINGO mark, the absence of any other element in the cited mark is significant. In other words, were there another term in the cited mark unlike any term in applicant's mark, this might have contributed to a finding of overall dissimilarity of the marks. Under the circumstances, however, the marks are identical, but for applicant's addition of a disclaimed term.

⁴ Any attack on the validity of the cited registration, e.g., to establish that the mark is descriptive, is impermissible in the context of this ex parte appeal. See *In re Dixie Restaurants, Inc.*, 41 USPQ2d 1531 (Fed. Cir. 1997).

Turning to the goods and services, the casino services in the cited registration are not restricted in any way and are presumed available to all normal classes of consumers of such services. While there are no restrictions on channels of trade or classes of consumers for applicant's goods, it is generally known and not subject to reasonable dispute that the gaming and casino industry is highly regulated and that applicant's goods, even without any restriction included in the identification, can be considered as generally targeted only to business purchasers in the gaming and casino industry. Thus, the involved goods and services are not competitive and do not share channels of trade. Nonetheless, the Board's focus is not solely on purchaser confusion, but must also encompass likely confusion among ultimate users of applicant's machines and registrant's services.

Applicant's goods, as discussed above, would be marketed to purveyors of casino services. The application includes applicant's averment that the mark BIG BUCKS BINGO is intended to be used on the goods. Accordingly, the Board must consider whether casino patrons who may be exposed to registrant's mark would, if exposed to applicant's mark on gaming machines, be mistaken or confused or deceived. Casino patrons would likely conclude

that the services of registrant and the machines of applicant have a common source or are otherwise related.

Given the identical nature of the marks (but for applicant's addition of a disclaimed term), and the overlap between consumers of registrant's services and ultimate users of applicant's machines, the Board finds that there exists a likelihood of confusion, mistake or deception. Accordingly, the refusal based on the registration no. 1,847,026 for the mark BIG BUCKS for casino services is affirmed.

Turning to the refusal based on registration no. 1,388,945 for the mark BIG BUCKS SLOTS for "slot machines," the identified goods are essentially identical to those of applicant. The respective goods, since there are no restrictions in the identifications, are presumed to be marketed through the same channels of trade to similar, if not identical, classes of consumers.

In regard to the marks, the Examining Attorney asserts that BINGO in applicant's mark and SLOTS in registrant's mark are the subject of disclaimers; that disclaimed matter typically is less significant; and that the dominant element in each mark is the common phrase BIG BUCKS. Moreover, the Examining Attorney relies on oft-cited cases holding that points of similarity between marks are more

important than points of difference and that when goods are identical the degree of similarity of marks necessary to support a finding of likelihood of confusion is less than when the goods are different.

The Examining Attorney's approach is too formulaic. Although the Examining Attorney is correct in his assertion that disclaimed matter typically is less significant and, therefore, entitled to less weight when marks are compared, the different disclaimed words are still part of the respective marks and must be considered. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *see also, Computer Identics Corporation v. Identicon Corporation*, 182 USPQ 438 (TTAB 1974) (no likelihood of confusion between IDENTICON and the marks COMPUTER IDENTICS and COMPUTER IDENTICS CORPORATION, notwithstanding that "computer" and "corporation" are common descriptive words). Given the highly suggestive nature of "big bucks," for slot machines, the presence of an additional word in each mark, even though each is the subject of a disclaimer, is significant.

In considering how the respective marks will be perceived, the Examining Attorney relies on another oft-cited premise, i.e., that the Board's focus should be on the average purchaser who normally retains a general rather

than a specific impression of trademarks. We find it significant, however, that the average purchaser of slot machines and gaming devices would be a sophisticated business purchaser. Thus, while it has been held that even sophisticated purchasers are not necessarily immune to source confusion, business purchasers operating in the context of a heavily regulated industry are likely to be discriminating in their purchases of slot machines used in casinos or other gaming establishments. Such purchasers are less likely to rely on highly suggestive marks to differentiate one source of slot machines from another. The Board finds the *duPont* factor focusing on sophistication of purchasers dispositive in regard to the refusal of registration based on registration no. 1,388,945, which is, therefore, reversed.⁵

⁵ In regard to this refusal, the possibility that ultimate users of the two different brands of slot machines might be confused does not dictate a different result because, for items sold to businesses, potential confusion among ultimate users who would not influence future purchases of the goods does not support a finding of likelihood of confusion. See *Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1392.

Hanak, Administrative Trademark Judge, concurring in part, dissenting in part:

I agree with Judge Rogers' conclusion that there is no likelihood of confusion resulting from the contemporaneous use of applicant's mark BIG BUCKS BINGO and registrant's mark BIG BUCKS SLOTS for identical goods, namely, slot machines. Judge Rogers correctly notes that the purchasers of slot machines (casino operators and owners) are sophisticated and are not "likely to rely on highly suggestive marks to differentiate one source of slot machines from another." (Rogers opinion page 8). I would only add that as applied to slot machines, the term "big bucks" is extremely highly suggestive in that this term is defined as meaning "a large amount of money." The Random House Dictionary of the English Language (2d ed. 1987). Thus, as applied to slot machines, the term "big bucks" would immediately inform purchasers or users of the machines that said machines offer large payoffs to winners.

However, I respectfully disagree with Judge Rogers' conclusion that there exists a likelihood of confusion resulting from the contemporaneous use of applicant's mark BIG BUCKS BINGO for slot machines and registrant's mark BIG BUCKS for casino services. At the outset, I find that the term "big bucks" is likewise extremely highly suggestive

when used for casino services in that it immediately informs individuals that the payoffs involve large sums of money. Thus, the only element common to these two marks is the extremely highly suggestive term "big bucks." It has been repeatedly held that "the mere presence of a common, highly suggestive portion [in two marks] is usually insufficient to support a finding of likelihood of confusion." Tektronix, Inc. v. Daktronics, Inc., 534 F.2d 915, 189 USPQ 693, 694 (CCPA 1976) and cases cited therein.

As cogently explained by Judge Rogers, ordinary consumers do not purchase slot machines. Thus, the only common purchasers of both slot machines and casino services are casino operators and owners who, perhaps on occasion, make personal wagers in casinos. However, when casino operators and owners make personal wagers in casinos, they do not lose their sophistication. Hence, because the only common purchasers of both slot machines and casino services are very sophisticated casino operators and owners, I would find that there exists no likelihood of confusion resulting from the contemporaneous use of the extremely highly suggestive marks BIG BUCKS BINGO for slot machines and BIG BUCKS for casino services.

Judge Rogers does not contend that sophisticated casino operators and owners would be confused as a result

of the contemporaneous use of the foregoing two marks on their respective goods and services. Rather, Judge Rogers notes that "the Board's focus is not solely on purchaser confusion, but must also encompass likely confusion among ultimate users of applicant's [slot] machines and registrant's [casino] services." (Rogers opinion page 5). Judge Rogers correctly notes that the applicant has stated that its mark BIG BUCKS BINGO is intended to be used on its slot machines. However, there is nothing in the record to indicate that this use will be in a manner prominent enough such that the ultimate users of applicant's slot machines will ever see applicant's mark BIG BUCKS BINGO. A more likely scenario is that applicant's mark BIG BUCKS BINGO will be displayed on applicant's slot machines in a subordinate manner such that it could be seen only by the purchasers of the slot machines (sophisticated casino operators and owners) and not by the users of the slot machines (ordinary gamblers).

I make the foregoing presumption on the following basis. The owner of both cited registrations is Bally Manufacturing Corporation. Based upon the fact that Bally owns registrations for both slot machines and casino services, it appears that Bally not only manufactures slot machines which it then sells to other casinos, but also

operates its own casinos. While other casinos may be willing to purchase Bally's BIG BUCKS SLOTS slot machines, I seriously doubt that these other casinos would wish to have Bally's mark BIG BUCKS SLOTS prominently displayed on the slot machines such that it is visible to the customers of these other casinos. If such were the case, then these other casinos would, in essence, be potentially advertising and promoting Bally's competing BIG BUCKS casino services.

Hohein, Administrative Trademark Judge, concurring in part and dissenting in part:

I concur with Judge Rogers' conclusion that there is a likelihood of confusion from contemporaneous use of applicant's mark BIG BUCKS BINGO for slot machines and gaming devices, namely, gaming machines, and registrant's mark BIG BUCKS for casino services, namely, operation of gaming machines. While I disagree with the overly broad proposition advanced by Judge Rogers that, "were there another term in the cited mark unlike any term in applicant's mark, this might have contributed to a finding of overall dissimilarity of the marks," I agree with his finding that, under the circumstances in this case, "the marks are identical, but for applicant's addition of a disclaimed term."

In particular, as to the overall commercial impression engendered by each of the respective marks, I find that, as applied to applicant's slot machines and gaming machines, the presence in its BIG BUCKS BINGO mark of the generic term BINGO, which the Random House Dictionary of the English Language (2d ed. 1987) at 209 defines as "a form of lotto in which balls or slips, each with a number and one of the letters B, I, N, G, or O, are drawn at random and players cover the corresponding numbers printed on their

cards, the winner being the first to cover five numbers in any row or diagonal or, sometimes, all numbers on the card," adds nothing of significance to distinguish such mark from registrant's BIG BUCKS mark for casino services. Moreover, while I agree with Judge Hanak to the extent that the term BIG BUCKS in the marks at issue is highly suggestive as applied to the respective goods and services, the marks as a whole nevertheless have the identical connotation and, as previously noted, project the same commercial impression.

Furthermore, as Judge Rogers correctly points out, in determining whether there is a likelihood of confusion, "the Board's focus is not solely on purchaser confusion, but must also encompass likely confusion among ultimate users of applicant's machines and registrant's services." Although I do not disagree with Judge Hanak's view that, because the cited registrant is also the owner of the other cited registration for the mark BIG BUCKS SLOTS for slot machines, third-party purchasers of applicant's slot machines and those sold by registrant would not be desirous of "potentially advertising and promoting Bally's competing BIG BUCKS casino services" through the prominent display on their slot machines of the marks BIG BUCKS BINGO and BIG BUCKS SLOTS, I find nothing in Section 2(d) of the

Trademark Act which should so limit the scope of protection afforded a registration. If anything, the owner of more than one registration for the same or essentially the same mark for related goods and/or services often enjoys a wider latitude of protection than if it owned only a single registration.¹

Here, while Judge Hanak maintains that there is nothing in the record which suggests that either applicant or registrant will use their respective slot machine marks in a manner prominent enough that the ultimate users of such goods will see the marks, I can find no reason not to assume that such marks will be prominently displayed. To the contrary, marks for slot machines would typically be displayed in a highly visible manner as a means of inducing or attracting the ultimate users of the goods (ordinary gamblers) to play the machines and, on the facts of this case, to win a large amount of money. Certainly, there is nothing in applicant's application to restrict its possible manner of use of its mark nor, when separately considered as the cited registrations must be, is there any limitation as to the ways in which registrant may utilize either its

¹ Although not present in this case, the owner of a family of registered marks (see, e.g., J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991)) is one example.

BIG BUCKS SLOTS mark for slot machines or its BIG BUCKS mark for casino services. Consequently, I concur with Judge Rogers' conclusion that consumers familiar with registrant's use of its BIG BUCKS mark for casino services involving the operation of gaming machines would be likely, as the principal users of gaming machines, including slot machines, to be confused as to the source or sponsorship of such closely related services and goods upon encountering applicant's use of its BIG BUCKS BINGO mark in connection with slot machines and gaming machines.

I would also find, however, that in light of the above comments, there is a likelihood of confusion from the contemporaneous use of the marks BIG BUCKS BINGO and BIG BUCKS SLOTS in connection with slot machines. While, in particular, the actual purchasers of such goods typically are casino operators and owners and, thus, they would indeed be highly sophisticated and discriminating buyers who would be expected to exercise a degree of care in their selections, the same simply cannot be said for the users of such goods, who as previously noted are overwhelmingly ordinary gamblers.² To those in the latter class, it is

² Notably, neither Judge Rogers nor Judge Hanak have adequately explained why the ultimate users of slot machines would not be likely to be confused as to the origin or affiliation of such goods when offered under the marks at issue. Specifically, Judge Rogers' justification, with which Judge Hanak concurs, for

simply not too formalistic an approach to believe, as the Examining Attorney contends, that as applied to *identical* goods, the dominant and hence source-distinguishing element in each of the respective marks is the term BIG BUCKS, notwithstanding the highly suggestive connotation thereof. In particular, just as the generic word BINGO in applicant's BIG BUCKS BINGO mark imparts nothing of trademark significance thereto, the word SLOTS in

reversing the Examining Attorney simply states, among other things, that "the possibility that ultimate users of the two different brands of slot machines might be confused does not dictate a different result because, for items sold to businesses, potential confusion among ultimate users who would not influence future purchases of the goods does not support a finding of likelihood of confusion," citing *Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, *supra*. This case, however, involves in my estimation a high probability--rather than a mere "possibility"--of confusion among the ordinary gamblers who constitute the ultimate users of the goods. As this Board has noted in, for example, *In re Artic Electronics Co., Ltd.*, 220 USPQ 836, 838 (TTAB 1983):

We concur entirely with the contentions of the Examining Attorney that in addition to source confusion among buyers, source confusion among ultimate users of the goods before us ... is both likely and encompassed within the confusion proscriptions of Section 2(d). The notion that likelihood of confusion is limited to purchaser confusion is simply not correct. The 1962 amendments to the Trademark Act, both in its sections relating to standards for refusal of registration and for trademark infringement, explicitly deleted the qualifying term "purchasers" after referring to marks likely "to cause confusion, or to cause mistake or to deceive," thereby evincing an intention to remove any limitation of such standards to purchasers of goods. We conclude, therefore, that a likelihood of confusion among users ... as to the source of such equipment is fully capable of supporting a denial of registration under Section 2(d) of the Trademark Act.

registrant's BIG BUCKS SLOTS mark is likewise generic and without trademark significance since, as set forth in Random House Dictionary of the English Language (2d ed. 1987) at 1800, the term SLOT is defined in relevant part as "*Informal*. See **slot machine**".

Inasmuch as I find, in view thereof, that when considered in their entirety, the marks BIG BUCKS BINGO and BIG BUCKS SLOTS engender essentially the same commercial impression when used in connection with slot machines, I would affirm the additional ground of refusal on the basis that ordinary gamblers, as the ultimate users of the goods, would be likely, when acquainted with registrant's BIG BUCKS SLOTS mark for slot machines, to be confused as to source or sponsorship upon encountering slot machines bearing applicant's virtually identical BIG BUCKS BINGO mark for the same type of goods.